Kenya Rural Roads Authority v Vipingo Ridge Limited & 2 others (Civil Appeal 18 of 2019) [2022] KECA 1089 (KLR) (7 October 2022) (Judgment)

Neutral citation: [2022] KECA 1089 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 18 OF 2019

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

OCTOBER 7, 2022

BETWEEN

KENYA RURAL ROADS AUTHORITY ..... APPELLANT

AND

VIPINGO RIDGE LIMITED ..... 1ST RESPONDENT

SUNSAIL TRADING LIMITED ..... 2ND RESPONDENT

MINISTRY OF ROADS ..... 3RD RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya in Mombasa (M.J. Anyara Emukule J.) delivered on 30th June 2016inMombasa HC. JR. Misc. Civil Application No. 42 of 2011)

JUDGMENT

1. The genesis of this appeal is a letter dated November 29, 2010, written by the Director General of the Kenya Rural Roads Authority, (the Appellant herein), which was addressed to Vipingo Ridge Limited. The said letter, which was referenced "Request for Permission to Re-align Mitangoni- Mtwapa Road D556" read as follows:

> " We refer to your letter Ref. No. AC/RDS/021/003/009 dated 20th March 2009 regarding the above application. We wish to inform you that available records indicate the existence of the road as the classified road D556.
>
> The economic benefit of the project to the area and the country is not in any doubt.
>
> The proposed realignment will however result in increased travel time for the area residents whose views have been expressed through several meetings you

have held with Bahari Constituency Roads Committee. The minutes of these meetings, copies of which were sent to our office, show that the Committee expressed their displeasure with the proposed realignment.

Due to the above objection by the residents who have been using the road, the matter of realignment and closure of the road cannot be concluded on technical grounds alone.

We therefore recommend that the barriers that you have erected across the Road D556 be removed with immediate effect until the issues we have raised above are addressed through the relevant channels..."

2. Vipingo Ridge Limited and Sunsail Trading Limited (the 1st Respondent and 2nd Respondents herein), being the registered owners, developers and managers of a golf estate on the property known as L.R. No 24880 (original Number 8724/5, 7334/4 and 5025/96) on which the said road was alleged to traverse, were aggrieved by the decision made in the said letter, and instituted judicial review proceedings in the High Court by way of a substantive Notice of Motion dated 3rd May 2011, against the Appellant and the Ministry of Roads (the 3rd Respondent herein). The 1st and 2nd Respondents sought orders of certiorari to quash the decision in the said letter requiring them to demolish and remove the gates/ barriers to their property known as L.R. No 24880 (Original Number 8724/5, 7334/4 and 5025/96) which were alleged to be on a road designated as D556, or in the alternative to quash the decision that their proposal for re-alignment of the said road could only be considered if the said gates/ barriers were removed.

3. The 1st and 2nd Respondents additionally sought an order of mandamus requiring the Appellant and the 3rd Respondent to act reasonably and consider its re-alignment proposal in accordance with the law; and an order of prohibition to prohibit the Appellant and 3rd Respondent from declaring that the alleged road known as D556 was a classified road, that the road cuts through their property, that the 1st and 2nd Respondents had encroached onto the alleged road by erecting barriers and/or gates which formed the entrance and provided security to their aforesaid property, or from in any manner whatsoever breaching and/or contravening the 1st and 2nd Respondents' proprietorship rights as guaranteed by the Constitution. The application was supported by two affidavits both sworn on March 31, 2011 by Robert Ward, the Chief Executive Officer of the 1st Respondent and Phillippe A. Zimmerlin, a licensed land surveyor, and by a statement dated April 12, 2011.

4. The Appellant opposed the application by way of a replying affidavit sworn on December 7, 2011 by S. O. Obara, its Regional Manager, who deposed that the Appellant was responsible for management, development, rehabilitation and maintenance of rural roads classified as "D", "E" and "others", and that the road that was the subject to the judicial review proceedings was classified as D556 and linked important centres to each other, and was therefore important to the members of the public residing around the area. Further, that any decision involving blocking and or realigning the said road must take into consideration the views of the stakeholders, who is this instance were the members of the communities using the road who were represented by the Constituency Roads Committee.

5. The 1st and 2nd Respondents subsequently filed another application in the High Court by way of a Notice of Motion dated March 12, 2013, seeking orders that the Appellant produces the original map annexed to its replying affidavit for inspection, and that the deponent thereof, S. O. Obara, be cross examined on the contents of the affidavit. After hearing the parties, the High Court (Muriithi J.) in a ruling delivered on March 30, 2015 ordered that the subject map which was annexed as "S001" to the Appellants replying affidavit be expunged from the record, and should not be used on account of being hearsay, and that the said deponent attends court for purposes of cross-examination. The Court

also held that the Appellant and 3rd Respondents were at liberty to cross examine the deponents of the 1st and 2nd Respondents' affidavits. The hearing of the 1st and 2nd Respondents substantive notice of motion then proceeded to full hearing, with S.O. Obara being cross examined by the 1st and 2nd Respondent's counsel on his affidavit.

6. The 1st and 2nd Respondents' case was as follows. The 1st Respondent sub- leased part of the land known LR No 24880, from the 2nd Respondent for purposes of developing a golf course and residential estate, and that the said parcel of land arose from an amalgamation of three parcels of land, being parcels number 8724/5, 7334/4 and 5025/96. The 1st and 2nd Respondents annexed copies of the title deeds of the said parcels of land together with their respective deed plans. That on March 12, 2009, the District Roads Engineer for Kilifi wrote to the 1st Respondent's project manager, notifying them of a road reserve classified as D556 (Mitangoni-Mtwapa Road) on the said parcel of land, and asking that all existing structures on the said road reserve be removed. The 1st Respondents response and case was that no such road reserve exists or passes through their parcel of land as is evident from the title deeds and deed plans thereof, and that no such road classified as D556 exists in the records of the Ministry of Roads or survey plans. The 1st and 2nd Respondents annexed copies of correspondence exchanged and minutes of meetings held on the issue, of Kenya Gazettes on the various roads, and of the Roads Reclassification index and Schedule from the Ministry of Roads in support of their averments.

7. Regarding the request for re-alignment of the road the letter dated 20th March 2009, the 1st and 2nd Respondents' position was that in recognition of their corporate social responsibility, they were prepared to work with the Ministry of Roads in finding a solution by an alternative road running along but outside the perimeter wall, provided it got the relevant permission from the land owners to provide a pedestrian/ cycle/ motorcycle route linking Chodari village to the Mombasa- Malindi Highway, in order to improve access to the village for the public and ensure harmony and peaceful co- existence of the communities. However, that despite their efforts to have the matters resolved on an amicable basis, the Ministry insisted that they must remove the gates and structures constructed on the alleged road reserve and failure to which they would be demolished by the Appellant.

8. It was their conclusion, that the Ministry of Roads, acting by itself and through the Appellant was adamant in enforcing an illegality upon the 1st and Respondents based on an erroneous and illegal decision that had no basis or foundation in law by threatening to demolish their property and gates, which would not only cause it immense loss and damage and affect their project adversely, but also compromise security of its property and estate by making it freely accessible to trespassers.

9. The Appellant's contention on the other hand was that the road classified as D556 had its origins in the 1938 cadastral plan (FR 46/3), wherein there was an indication of a motorable track shown as a footpath to Takangu and Gongoni, and that the topographical sheets Nos. 198/2, 198/4 and 198/3 published by Survey of Kenya in 1965, 1971 and 1972 showed that the said motorable track was classified as E923 in some sections and E924 in others. The Appellant detailed the routes of the roads classified as E923 and E924 from Mitagoni market upto the Mombasa-Malindi Highway at the Chief's Office, Mtwapa, and averred that the said roads appear in the Ministry of Works Schedule of Public Roads of 1970 in sheet No 94 on reclassification of minor roads. Further, that a portion of E923 and the whole of E924 were reclassified and renamed D556 as a result of increased traffic thereon, and that the said road has therefore been in existence as far back as 1938. That after the 1st and 2nd Respondents purchased plot LR. No. 8724/5, 7334/4 and 5025/96 and amalgamated them to form plot LR. No 24880, they commenced construction of the perimeter fence which blocked the road classified as D556, as a result of which members of the public complained to the Appellant.

10. The Appellant averred that the application for realignment by the 1st and 2nd Respondents in their letter dated June 9, 2009 was an acknowledgement of the existence of the said road and was intended to avoid the road passing through the amalgamated plot No. LR. 24880. However, that the proposal for realignment was rejected by the Constituency Roads Committee after stakeholders' meetings, as it would increase travel time, and the Appellant could therefore not accede to the 1st and 2nd Respondents application. Further, the members of the public had been using the land from 1938 and were therefore entitled in the public interest to continued use and enjoyment of access without any interference irrespective of whether the said road was indicated on the map or not. The Appellant annexed copies of the1938 cadastral plan (FR 46/3), the topographical sheets Nos. 198/2, 198/4 and 198/3, and the Ministry of Works Schedule of Public Roads of 1970 Sheet No 94.

11. After hearing the parties, the High Court (Emukule J.) was of the view that the issue arising for determination was whether there was a road that traversed the 1st and 2nd Respondents parcels of land as claimed by the Appellant. After perusing the map sheets, the High Court found that neither road E923 nor road E924 passed through the parcel of land known as LR. 24880, and that road D556, being a reclassification of the said roads could not therefore be said to traverse the 1st and 2nd Respondents' property. Furthermore, that the roads and tracks, motorable or otherwise, running through the 1st and 2nd Respondents' property did not translate to public highways or confer the right of way to the public, unless the procedure under the *Public Roads and Roads of Access Act* was followed. The High Court in this regard found that there was no evidence of any report made to the Minister as required under Section 8(1) of the said Act, nor of any decision by a roads board as required under section 8(4) of the Act that roads E923 and E924, classified into road D556, be declared roads of access or public roads. It was therefore found that it was illegal of the Appellant to condemn the 1st and 2nd Respondents' land to a road of access or a public road without reference to the *Public Roads and Roads of Access Act*. The High Court consequently quashed the impugned letter requiring the 1st and 2nd Respondents to demolish the gates on their property. The High Court however declined to grant the orders of mandamus and prohibition so sought.

12. The Appellant, being dissatisfied with the decision of the High Court, filed a Memorandum of Appeal in this Court dated 5th February 2019 in which it has raised five grounds of appeal faulting the said decision on two fronts. Firstly, that the 1st and 2nd Respondent's claim challenged the existence of the public access road namely E923 and E924 reclassified as road D556 in judicial review proceedings, which concerned the review of the merits of a decision and disputed facts, and was not within the purview of judicial review proceedings which are concerned with the decision making process. Secondly, that the trial Judge erred since the 1st and 2nd Respondents failed to establish any reasonable grounds for granting orders of judicial review, and also failed to take into account relevant matters. The two issues therefore that arise for determination in this appeal are whether the dispute before the High Court was one that was amenable to judicial review, and if so whether the orders granted by the High Court were merited.

13. We heard the appeal virtually on April 11, 2022, and learned counsel Mr. Wafula appeared for the Appellant, while learned counsel Mr. Sanjeev Khagaram appeared for the 1st and 2nd Respondents and learned counsel Mr, Makuto appeared for the 3rd Respondent. Mr. Wafula and Mr. Khagram highlighted their written submissions dated February 5, 2021 and May 12, 2021 respectively, while Mr. Makuto indicated he did not file any written submissions and made oral submissions in support of the appeal.

14. We in this respect reiterate our duty as the first appellate Court as set out in *Selle and Another vs Associated Motor Boat Co. Ltd & Others* (1968) EA 123, which is to reconsider the evidence, evaluate it

and draw our own conclusions of facts and law, and we will only depart from the findings by the trial Court if they were not based on the evidence on record; where the said court is shown to have acted on wrong principles of law as held in *Jabane vs Olenja* [1986] KLR 661; or if its discretion was exercised injudiciously as held in *Mbogo & Another vs Shah* (1968) E.A.

15. On the first issue as regards the amenability of the dispute between the parties to judicial review proceedings, Mr. Wafula submitted that the High Court ventured into issues of substance that went to the merits of the Appellant's decision and which were beyond the scope of judicial review; and that the question of the existence of classified road D556 was not one to be determined by the court in exercise of its judicial review jurisdiction but was to be determined after a plaint has been filed and the suit determined on its merits. Reliance was placed on the decisions in *Republic vs Judicial Service Commission* (2004) 1 KLR 203 and *Akaba Investments Ltd vs Kenya Ports Authority*, Civil Appeal No. 225 of 2003 for the submission that judicial review is concerned with the decision making process not the merits of the decision.

16. Related to this argument, was the submission by Mr. Wafula that the existence of the subject road was a disputed fact, and it is established that judicial review is ill equipped to deal with disputed matters of fact that would involve fact finding on an issue which requires proof as held in *Republic vs National Transport & Safety Authority & 10 Others ex parte James Maina Mugo* (2015) e KLR. Reliance was also placed on the decision in *Moses Kanyoro & 8 Others vs Social Development Officer, Makadara Constituency & 2 Others* (2020) eKLR. Mr. Makuto, in support, submitted that the High Court also had no jurisdiction as the matter involved land use, which was within the jurisdiction of the Environment and Land Court.

17. Mr. Khagram on his part refuted the allegation that the High Court made a ruling on the merits of the decision as regards the existence or otherwise of road D556 or on disputed facts; and submitted that the Court merely carried out an assessment of the evidence before it to determine the basis and legality or otherwise of the Appellant's decision. The counsel cited the case of *R vs Kenya Urban Roads Authority & 2 Others ex parte Tamarind Village* (2015) e KLR in support of this position. Further, that it was not in dispute that the 1st Respondent held an unimpeached title to the suit property and the High Court found that there was no evidence that road D556 traversed the said property, hence no disputed facts existed. Mr. Khagram also pointed out that the 3rd Respondent did not file any pleadings in the High Court on the issue of the High Court's jurisdiction.

18. It is necessary at the outset to clarify the dispute that was the subject of the High Court's judicial review proceedings. Judicial review is specifically defined in *Black's Law Dictionary*, Ninth Edition at page 924 thereof as "the court's power to review the actions of other branches or levels of government, especially the power to invalidate legislative and executive actions as being unconstitutional, or the courts review of a lower court's or an administrative body's factual or legal findings". The subject administrative body in the instant appeal whose decision was being reviewed was the Appellant, and the impugned decision was the one contained in the letter dated November 29, 2010 that recommended to the 1st and 2nd Respondents that "the barriers that you have erected across the Road D556 be removed with immediate effect until the issues we have raised above are addressed through the relevant channels." The High Court therefore had supervisory jurisdiction over the administrative decision made by the Appellant in exercise of its judicial review jurisdiction under Order 53 of the *Civil Procedure Rules*, which was the provision relied upon by the 1st and 2nd Respondents.

19. The Appellant is of the opinion that its decision was not amenable to judicial review as it concerned a merit review as to the existence of the road D556, which is a disputed fact. The remit of a court's jurisdiction in terms of merit review of a decision in judicial review proceedings is now settled, and

this Court (Koome JA (as she then was), Sichale & Otieno-Odek, JJ.A) in this regard held as follows in *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others* [2016] eKLR :

> " An analysis of Article 47 of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7
>
> (2) (f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; Section 7 (2) (j) identifies abuse of discretion as a ground for review while Section 7 (2) (k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7 (2) (k) subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd vs Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. Section 7 (2) (i) (i) and (iv) deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in Section 7 (2) (i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in Section 7 (2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act."

20. The merit review of administrative decisions in judicial review has been necessitated by the expansion of the concept of legality to include grounds of fairness, rationality and proportionality, in addition to the traditional grounds of substantive and procedural ultra vires. The expanded grounds require courts to make qualitative examinations and judgment calls on an impugned decision. In addition, an examination of legality of a decision may also entail examining and making conclusions on the legal correctness of the impugned decision in light of errors in the applicable law, the existence of any precedent facts that may be required by the law, and the correct interpretation of the legal provisions of that law by a public body or official, which are aspects of merit review. It is therefore not entirely correct to state that judicial review is only concerned with the decision making process as alleged by the Appellant, and the extent of process or merit review will depend on the circumstances in which the impugned decision is made. The line that should not be crossed by a court in judicial review is to usurp the decision-making role of a public or administrative body, and substitute its decision for that of the decision making body, hence the limited remedies that are available in judicial review.

21. This limit is also the reason for the general principle in judicial review that fact finding should be left to the decision-making body, and not the courts, and that judicial review proceedings are therefore not appropriate where there are disputed facts in issue. However, there are two exceptions to this principle as explained in *Judicial Review: Principles and Procedures* (2013 Edition) by Jonathan Auburn et al, at paragraphs 20-03 to 20-06. Firstly, where an error of fact made by the decision making body gives rise to a reviewable error of law. This arises in cases where the decision making body's findings are

unsupported by any evidence such that its conclusions are irrational; where the decision making body misunderstands or where the exercise of the decision making power depends on the existence of a particular factual situation, and the court has to determine whether the decision making body reached the correct conclusion as to the factual situation. Secondly, where the court has to decide on a question of fact in order to determine the claim, in which case the claimant has the burden of proving that fact by witness statements or affidavits and documentary evidence or by way of cross-examination of witnesses. The categories of cases in which a court can examine disputed facts in judicial review proceedings cannot therefore be definitively said to be closed.

22. In the circumstances of the present appeal, it is notable that the basis of the Appellant's impugned decision in the letter dated November 29, 2010 was "that available records indicate the existence of the road as the classified road D556" and "objection by the residents who have been using the road". The decision was therefore predicated on records that the road classified as D556 existed, and the non –existence of those records and evidence was material to the legality of the Appellant's decision. The High Court in this respect therefore did not err in examining whether the said road traversed the 1st and 2nd Respondents land, as this was not a disputed fact as alleged by the Appellant, but was the factual situation it alleged to exist and that was the basis of its decision. The Court therefore was within its review jurisdiction to examine the evidence provided by the Appellant and 1st and 2nd Respondents as regards the existence of this factual situation, in order to determine the legality of the Appellant's decision.

23. We shall therefore proceed with an examination of the second issue in this appeal, which is whether the orders granted by the High Court had merit. Mr. Wafula submitted in this regard that the High Court ignored the evidence on record that the road D556 previously existed as a section of E923 and E924. Further that there was no illegality, irrationality, procedural impropriety or unreasonableness in the Appellant's decision since the 1st and 2nd Respondents had blocked a public access road D556 which they applied to be realigned, and which application was rejected by the area residents. Reliance was placed on the grounds for judicial review set out in *Council of Civil Service Unions vs Minister for the Civil Service* (1985) AC 374 . Lastly, that members of the public had used the road since the 1930's, and the public interest must prevail over the private interests of the 1st and 2nd Respondents. The case of *Dellian Langata Limited vs Simon Thuo Mula & 4 Others* (2018) eKLR was cited for this proposition.

24. Mr. Khagram maintained that there was no evidence that roads E923 &E924 were reclassified as D556 or that the said road traversed through the 1st and 2nd Respondents' property, which fact was confirmed by the Appellant's own witness during cross-examination, while noting that the alleged survey deed plan that was produced by Engineer S.O. Obara in his replying affidavit was expunged by the court for being undated and for having an unknown author and source. Further, that no such road is identifiable on the official survey maps and deed plans of the 1st and 2nd Respondents property, as required by the *Survey Act*, nor did the Appellant or 3rd Respondent produce any gazette notices establishing the said road as required by the *Roads Act* of 2007 and the *Public Roads and Roads of Access Act*.

25. Lastly, that no question of re-alignment arose because there was no indication that the said road existed in law, and it was irrational, illegal and malicious to require the demolition of the 1st and 2nd Respondents property in breach of their proprietary rights and principles of natural justice. Reliance was in this regard placed on the decision of this Court in *Elizabeth Wambui Githinji & 29 Others vs Kenya Urban Roads Authority & 4 Others* (2019) e KLR.

26. The establishment of a public road and acquisition of land for this purpose is regulated by statute. Under section 8 of the *Public Roads and Roads of Access Act*, the conversion and dedication of a road of access into a line of public travel is made by the Minister in charge of roads, by order published in the

Kenya Gazette. It is notable in this regard that the Appellant relied on various classification of roads and the schedule of public roads of 1970 as evidence of the existence of a public road on the 1st and 2nd Respondents property. The classification of a public road under section 47 and the First Schedule to the Roads Act of 2007 can only done after such conversion and dedication of a line of travel as a public road, since the powers of classification are only granted and exercised in relation to public roads, which are defined under the Roads Act as "public road as defined under the *Public Roads and Roads of Access Act*". The first legal prerequisite and evidence therefore that required to be established and shown by the Appellant to justify its classification if any, of road D556 was the gazette notice converting any foot paths or roads of access on the 1st and 2nd Respondents' property to a public road, and specifically road D556. The Appellant did not produce evidence of any such gazette notice.

27. The second legal step required for the existence of a public road is the cadastral survey to establish existing property lines and to establish and mark and document the legal boundaries between the road and private lands which process is undertaken under the *Survey Act*. Section 24 of the *Survey Act* provides as follows in this regard:

> " Every trigonometrical station, fundamental benchmark and boundary beacon erected or placed for the purpose of defining the boundaries of any holding or land shall be shown on the plan (if any) attached to, or referred to in, any document or instrument purporting to confer, declare, transfer, limit, extinguish or otherwise deal with or affect any right, title or interest, whether vested or contingent to, in or over such holding or land, being a document or instrument which is required to be registered, or is ineffectual until registered, under any written law for the time being in force relating to the registration of transactions in or of title to land".

28. Under section 32 of the Act, authentication of survey plans is by the signature of the Director of Survey or of a Government surveyor authorized in writing by the Director in that behalf, or by the affixing of the seal of the Survey of Kenya. This Court confirmed this position in Elizabeth Wambui Githinji & 29 Others vs Kenya Urban Roads Authority & 4 Others (supra). The Appellant did not provide evidence of any such authenticated survey plan showing the existence of road D556 traversing through the 1st and 2nd Respondents property.

29. It is also notable, that the Appellant, being a statutory body is regulated by statute in the decisions it makes and section 10(1) of the Roads Act provides that its functions are the management, development, rehabilitation and maintenance of all public roads in the cities and municipalities in Kenya except where those roads are national roads. The Appellant did not provide evidence of the legal provisions that gives it powers over private land, and in particular, provisions of the law that entitles it to rely on rights arising out of prescription, use by the public or the public interest for the establishment of a public road over the 1st and 2nd Respondents over the subject property. On the contrary, section 23(1) of the Roads Act provides for a specific procedure to be followed by the Appellant as follows:

1. Where an Authority requires any land for its purposes under this Act, such Authority may either—

    a. if such land is not public land, acquire such land through negotiation and agreement with the registered owner thereof:

        Provided that, notwithstanding the provisions of section 6 of the *Land Control Act* (Cap. 302), the ensuing transaction shall not require the consent of a land control board if the land to be acquired is agricultural land; or

b. if such land is public land, or if the Authority is unable to acquire it by agreement in accordance with paragraph (a) of this subsection, notify the Minister responsible for Public Lands that the land specified in the notice is required for the purposes of the Authority.

30. It is evident from the letter of November 29, 2010 that this procedure was not considered nor followed by the Appellant, despite attempts by the 1st and 2nd Respondent to initiate the negotiations by the request for re- alignment. The decision relied on by the Appellant, namely Dellian Langata Limited vs Simon Thuo Mula & 4 Others (supra) is distinguished as the land in question was pubic land and not private land as in the present appeal. All in all, it is our finding that the High Court did not err in finding that there was no evidence of a public road existing on the 1st and 2nd Respondent's property to support the Appellant's decision in the letter dated November 29, 2010, and that the said decision was therefore illegal and irrational, and subject to quashing.

31. We therefore do not find any merit in this appeal, which is hereby dismissed with costs to the 1st and 2nd Respondents.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF OCTOBER, 2022.

S. GATEMBU KAIRU (FCI Arb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR